



FAIR WORK
AUSTRALIA

DECISION

Fair Work Act 2009

s.160 - Application to vary a modern award to remove ambiguity or uncertainty or correct error

Liquor, Hospitality and Miscellaneous Union

(AM2010/58)

HOSPITALITY INDUSTRY (GENERAL) AWARD 2010

[MA000009]

Hospitality industry

VICE PRESIDENT WATSON

SYDNEY, 4 JUNE 2010

Application to vary clause 37 Public holidays – preservation of an existing entitlement for part-time employees under a pre-reform federal Award – Fair Work Act 2009 s 116, 160.

[1] This decision concerns an application by the Liquor, Hospitality and Miscellaneous Union (LHMU) pursuant to s 160 of the *Fair Work Act 2009* (the Act) to vary clause 37 Public holidays of the *Hospitality Industry (General) Award 2010*¹ (the Modern Award) to remove ambiguity or uncertainty.

[2] The matter was listed for mention and programming on 12 May 2010. Mr N Swancott represented the applicant, Mr D Story represented the Australian Federation of Employers and Industries (AFEI), Mr P Ryan represented the Australian Hotels Association (AHA) and Ms R Scott represented the Hotel Motel and Accommodation Association (HMAA).

The application

[3] Clause 37 of the Modern Award provides as follows:

“37. Public holidays

37.1 National Employment Standards

(a) Public holidays are provided for in the NES

By agreement between the employer and the majority of employees in the relevant enterprise or section of the enterprise, an alternative day may be taken as the public holiday instead of any of the days prescribed in s.115 of the Act.

(b) Additional arrangements for full-time employees:

- (i) A full-time employee whose rostered day off falls on a public holiday must, subject to clause 32.2, either:
 - paid an extra day's pay; or
 - be provided with an alternative day off within 28 days; or
 - receive an additional day's annual leave.
- (ii) A full-time employee who works on a public holiday which is subject to substitution as provided for by the NES will be entitled to the benefit of the substitute day."

[4] The applicant seeks to ensure that the arrangement available for full-time employees in clause 37.1(b) extends to part-time employees. It submits that such an arrangement existed prior to the Modern Award's introduction under *The Hospitality Industry—Accommodation, Hotels, Resorts and Gaming Award 1998*² (pre-reform federal Award). It refers to clause 12.2(c) of the Modern Award in support of its application. Clause 12.2(c) provides:

"**12.2** A part-time employee is an employee who:

...

- (c) receives, on a pro rata basis, equivalent pay and conditions to those of full-time employees who do the same kind of work."

[5] The applicant seeks to insert a new sub-clause in clause 37.1 in the following terms:

"(c) Sub-clause (b) of this clause applies to part-time employees in the manner specified in clause 12.2(c) of this Award."

[6] The AHA filed a written submission opposing the variation sought prior to the mention and programming on 12 May 2010. It submitted that the new sub-clause sought by the applicant would be too broad in its effect. It submits that part-time employees are not entitled to an additional benefit for public holidays that fall on days that are outside the part-time employees' regular pattern of work pursuant to s 116 of the Act. It submitted that the new sub-clause would not reflect the entitlement that did exist under the pre-reform federal Award.

[7] The HMAA also filed a written submission prior to 12 May 2010 in opposition.

[8] The AHA did however propose an alternative. It submitted that to preserve the entitlement that did exist under the pre-reform federal Award for part-time employees, a new sub-clause in clause 37.1 could be alternatively worded as follows:

"(c) **Arrangements for part-time employees**

Part-time employees are entitled to public holidays prescribed in s. 115 of the Act without loss of pay if those public holidays fall on days agreed under

clauses 12.3 and 12.4. Part-time employees who work on a public holiday must be paid in accordance with clause 32.”

[9] The LHMU support this alternative wording proposed by the AHA. It submitted that the alternative wording still achieves the objective of removing ambiguity or uncertainty within the Modern Award.³ The alternative wording was also supported by the HMAA.

[10] I provided all potentially interested parties an opportunity to address the amended application. No further submissions were received.

[11] In my view there is ambiguity or uncertainty as to whether an entitlement within the industry has continued under the Modern Award for part-time employees. I am satisfied that the application should be granted and that the ambiguity or uncertainty should be remedied by making the variation sought in the amended application. A determination to this effect will be issued with this decision with an operative date of 12 May 2010.

VICE PRESIDENT WATSON

Appearances:

N Swancott for the Liquor, Hospitality and Miscellaneous Union
D Story for the Australian Federation of Employers and Industries
P Ryan with *J Broomhead* for the Australian Hotel Association
R Scott for the Hotel, Motel and Accommodation Association

Hearing details:

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Sydney
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¹ MA000009

² AP783479CRV

³ PN11 Transcript of Proceedings 12 May 2010